IS ELECTRICITY WITHIN THE PRINCIPLE OF FLETCHER *v.* RYLANDS? — The principle now well known as that of *Fletcher* v. *Rylands* has lately been considered in England with reference to electricity, in the case of the *National Telephone Co.* v. *Baker*, 1893, 2 Ch. 186. The National Telephone Co. brought an action to restrain the defendant from using his electric tramway in such a manner as to interfere with the working of the plaintiff's telephone lines. It appears that the defendant in the operation of his tramway employed the single-trolley system, which requires the use of the earth as a return conductor. The plaintiff company, which also relied upon the earth for completing its circuit, complained that some of the electricity discharged by the defendant into the earth flowed into its "ground wires," and interfered with the operation of its lines so seriously as to render them practically useless.

The court (Kekewich, J.) gave judgment for the defendant. The express ground for the decision was that the defendant was authorized by a statutory provision to use electric power, and that the Legislature must be taken to have condoned in advance any mischief which might arise from a reasonable use of that power. But the greater part of the opinion is devoted to the consideration of the question whether, apart from statutory authority, the plaintiff company would not be entitled to obtain an injunction on the ground that the principle of *Fletcher* v. *Rylands* is applicable, and the court arrives at the conclusion that it would be entitled to an injunction. Kekewich, J., says: "I cannot see my way to hold that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage which that current does to his neighbor as he would have been if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or control its direction or force; but when once it is established that the particular current is the creation of, or owes its special existence to, the defendant, and is discharged by him, I hold that if it finds its way on to a neighbor's land, and there damages the neighbor, the latter has a cause of action." It will be observed that Kekewich, J., regarded the circumstances of this case as analogous in every respect to *Fletcher* v. *Rylands*, and thought it should be governed by the same principles which governed that case. The only significant difference between the two cases is that the Telephone Company was making an extraordinary, and not a natural, use of land. But that is not really an important difference; for it could scarcely be urged that if a dam on A's land gave way, and by the rush of water a reservoir on B's land were destroyed, A would not, on the theory of *Fletcher* v. *Rylands*, be liable to B for destruction of the dam. The remarks of Kekewich, J., which have been quoted are of course *obiter;* but nevertheless they indicate what the decision would have been if the attendant had been unable to avail himself of the defence of statutory authority. They are, moreover, especially notable as showing, for almost the first time since *Fletcher* v. *Rylands* was decided, a disposition on the part of an English court to apply the principle of that decision squarely, and without attempting to draw a distinction, as was done in the cases of *Nichols* v. *Marsland*, 2 Exch. D. 1, *Box* v. *Jubb*, 4 Exch. D. 76, and *Madras Co.* v. *Zemindar*, L. R. 1 Ind. App. 364.

In this country there have been a number of cases between telephone

companies and electric railway companies arising out of circumstances similar to those in the principal case. But in none of the cases does it seem to have been recognized that the principle of *Fletcher* v. *Rylands* was applicable. The leading American case perhaps is *Cumberland Telephone Co.* v. *United Ry. Co.*, 42 Fed. Rep. (Tenn.) 273. There *Fletcher* v. *Rylands* was very cursorily examined, and dismissed as not being in point. The court (Mr. Justice Brown) does not even seem to have taken the pains to ascertain what the decision in *Fletcher* v. *Rylands* really was. Now, however, that the analogy has been pointed out, it can hardly fail to receive attention in future litigation concerning damage caused by the lawful use of electricity. Since such cases are bound to arise with constantly increasing frequency, they may be the means of bringing the principle of *Fletcher* v. *Rylands* before the courts in many States where, strangely enough, the question has not yet been settled.

RESTRAINT OF TRADE. — The case of *Gamewell Fire Alarm Tel. Co.* v. *Crane et al.* (Massachusetts, not yet reported) shows the present position of the Massachusetts Supreme Court upon the question of contracts in restraint of trade. The defendant Crane agreed "not to engage in the business of manufacturing or selling fire-alarm or police-telegraph machines and apparatus, and not to enter into competition with the said Gamewell Co. either directly or indirectly, for the period of ten years next ensuing from the date of this agreement;" and this stipulation was held void, as in restraint of trade and contrary to public policy. Field, C. J., who writes the opinion, says: "So far as we are aware, in every modern case in this Commonwealth, except one [that one he distinguishes], where a contract in restraint of trade has been held valid, the restriction has been limited as to space. . . . The plaintiff did not buy the good-will of a . . . business; . . . it is an article of prime necessity for . . . large cities and towns; . . . the stipulation will tend to give the plaintiff a monopoly," and "may impair his [defendant's] means of earning a living. . . . The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff, . . . even if that should be the test, upon which we express no opinion." These are indications of six different tests of public policy, and the court are wary of pinning their faith upon any one. They conclude by saying that "if there is to be a change in the law, . . . we think that it is for the Legislature to make it." This case is a fair example of the Massachusetts view and of the present bad state of the law upon the subject. It must be worse restraint of trade to force a merchant to guard against all large contracts and against all negative personal agreements, in ignorance whether contracts about such things as police signals will be held bad because they affect "necessities" or because they "tend to monopoly," than it is to let a full-grown man agree not to deal in such "necessities." If we are to have this rule, we ought to have it stated so clearly that business engagements can be made with confidence. But why need we have this rule? As Mr. Eaton points out (4 HARVARD LAW REVIEW, 128 ff.), there is good authority and good reason for holding that the ultimate test is reasonableness. And if this is so, the doctrine of restraint of trade takes an unimportant place in the law, for elsewhere also equity will not enforce specific performance of an unreasonable agreement, and at law damages can be made to cover only so much of the